See Vol. 3386

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21308

RONALD E. GATES,
Appellant,

vs.

P. F. COLLIER, INC., a Delaware Corporation,
Appellee.

PETITION FOR REHEARING

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PETITION FOR REHEARING

Comes now the plaintiff-appellant, Ronald E. Gates, by his attorney and files this Petition for Rehearing of Judgment entered by the Court on June 14th, 1967, affirming the judgment of the court below.

Plaintiff-appellant reserves his argued position as to each of the points of appeal, but in this petition addresses himself solely to certain features wherein he believes the Court may be convinced its opinion is incorrect.

I

Errors Relating to Violation of Foreign Exchange Law of Japan

The Court erred in its failure to hold that the contracts were violations of the Japanese Foreign Exchange and Foreign Trade Control Law of Japan, for the following reasons.

A. The U. S. Military Personnel Sales (96B) Portion of the Contract Was Illegal under the Japanese Foreign Exchange Laws.

This Court interposed Article XIX of the Treaty between Japan and the United States which became effective June 22nd, 1960. (Said Article XIX is fully quoted in footnote 1[1].) The date of the contract in this case was April 15th, 1960. So for 78 days the contract was admittedly illegal. This court tried to minimize this illegality by stating that there was "no showing of any remittances of sums collected from armed forces personnel during the interval after the date of signature". There were sales and remittances under 96B accounts starting from April, 1960. See Defendant's Exhibit R40, Form 70s on 96B for April, '60-October, '62. (Tr. 890). See also Defendant's Exhibits R39, R37, R43. That there were sales and remittances under the April, 1960 contract immediately is understandable in that the April 15th, 1960 contract was a continuation by appellant Gates of what R. E. Gates & Son Co. did under said Gates & Son Co. contract with Collier dated May 1st, 1959. See Plaintiff's Exhibit 4 in Evidence. (Tr. 67, 239).

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1. ARTICLE XIX

1. Members of the United States armed forces, the civilian component and their dependents, shall be subject to the foreign exchange controls of the government of Japan.

2. The preceding paragraph shall not be construed to preclude transmission into or outside of Japan of the United States dollars or dollar instruments representing the official funds of the United States or realized as a result of service or employment in connection with this agreement *by members of the United States Armed Forces and the civilian component,* or realized by such persons and their dependents from sources outside of Japan.

3. The United States authorities shall take suitable measures to preclude the abuse of the privileges stipulated in the preceding paragraph or circumvention of the Japanese foreign exchange controls.

The important thing is that as of April 15th, 1960 the agreement was an agreement to do an illegal act. Such agreements are illegal. *Ewell* v. *Daggs*, 108 U.S. 143, 2 S. Ct. 408; *Tiffany* v. *Boatman's Sav. Inst.*, 18 Wall. (U.S.) 375. Plaintiff's Exhibit 9 dated April 1, 1960 clearly provided on page 3 with relation to the Japanese Bank Account in Tokyo that "The dollars collected are not to be deposited to this account, *but should be remitted together with Form 163.* By doing so, our Import License would not be effected."

Furthermore it is the rule supported by most authorities that where an agreement is entered into in violation of a statute, the subsequent repeal or modification thereof does not make the agreement valid. *Fitzsimmons* v. *Eagle Brewing Co.*, (C.C.A. 3) 107 F.2d 712, 126 A.L.R. 681. And the ground upon which this rule is based is that since the agreement never had a legal existence, the repeal or modification does not restore to it any validity. *Hannay* v. *Eve,* 3 Cranch (U.S.) 242, 2 L.Ed. 427; *Licznerski* v. *United States,* (C.C.A. 3) 180 F.2d 862; *Fitzsimmons* v. *Eagle Brewing Co.* (supra). See Annotation 126 A.L.R. 685 and 17 Am. Jur. 2d 530.

Appellant Gates further submits that said Article XIX of the Japan-United States Treaty does not permit Collier's Tokyo Branch Office to transmit United States dollars to New York. The evidence is clear in this case that up to April 1st, 1962 the collections for sales to Military personnel sales went to the Collier Tokyo Office. See Plaintiff's Exhibit 6 which changed this to direct mailing to New York after April 1st, 1962. Once Collier Tokyo Branch received these United States dollar amounts, the only lawful thing which Collier Branch Office could have done with said dollars received was to deposit said amount in a bank in Tokyo which would naturally convert the amounts into yen. To ship such amounts converted into yen into United

States Dollars it had to be licensed to convert said yen into United States Dollars. Colliers did not choose to follow this legal step, but chose to illegally mail out the dollar amounts collected direct to New York (in kind or in checks). It is submitted that Collier Tokyo Branch was not ever permitted under said Article XIX to send dollars out of Japan, permission to send out dollar amounts is only permitted "*by members of the United States Armed Forces and their civilian component.*" It was never intended that Collier's Tokyo Branch Office be granted the privileges of said Article XIX.

This Court further failed to consider the following most important point raised by appellant in his opening brief pages 22 to 24. Articles 27, 29 and 30, the Japanese Foreign Exchange Law (Plaintiff's Exhibit 98, pages AA 8-9) provided:

> "Article 27. Unless authorized as provided for in this law or in Cabinet Order, no person shall in Japan:
>
> (2) . . . receive any payment from an exchange non-resident."
>
> "Article 29. Unless authorized as provided for in this law or in Cabinet Order . . . no exchange resident shall abroad receive any payment from . . . an exchange resident as a consideration or association with surrender of any value abroad."
>
> "Article 30. No person may be a part to creation, modification, liquidation, settlement, or direct or indirect transfer of the following items or to any other transaction of the same, unless authorized as provided for by cabinet order;
>
> 2) Foreign claimable assets between exchange residents;
>
> 3) Claimable assets between an exchange resident and an exchange non-resident."

Gates, plaintiff-appellant, was an exchange resident. Colliers in New York City was an exchange non-resident. (See page 18 of Opening Brief for definitions of "Exchange Residents," "Exchange Non-Residents" and "Claimable Assets") In the Opening Brief at pages 22-23, Gates stated as follows:

> "The contracts of April, 1960 and September, 1961, covered sales to Military personnel under 96B accounts. The 'Outline of Procedure for Opening Tokyo Branch' Plaintiff's Exhibit 9 in Evidence clearly covered Dollar Sales as well as yen sales. (Tr. 81) Paragraph 5(e), page 2, differentiates the two and the Dollar sales were supplied with an 'imprest fund' at the Long Island Trust Co., Garden City Park, L. I., N. Y., on which Gates had the power of attorney to draw to pay commissions due him on these Dollar Sales. (Tr. 90)
>
> The documentary evidence in this case, Plaintiff's Exhibits 109 and 110 in Evidence, shows that 'P. F. Collier Inc., Japan Branch, Tokyo, Japan' had a checking account at said Long Island Trust Co., Long Island, New York and checks were drawn on said account from Tokyo by Gates and said Exhibit 110 shows that the checks drawn by Gates were deposited at the First National City Bank of New York, Wells Fargo Bank of San Francisco and the Chemical Bank of New York. The endorsements clearly show this. The funds for the imprest fund at Long Island were deposited by Colliers.
>
> Based on Plaintiff's Exhibit 75 in Evidence, a document prepared by Colliers as Evidence and presented to the Tokyo District Court, the total amount remitted in this manner from April, 1960 to May 1, 1960, amounted to:

$ 97,452.00	
348,082.40	(Tr. 892, modified by stipulation)
$445,534.40	

The 34% commission paid to Gates according to said Exhibit 75 was:

$ 31,342.77
90,313.63

$121,656.40

And the total 7% commission paid to Gates was:

$ 86.78
9,731.33

$9,818.11

These sums were not insignificant. It is submitted that the 96B (Military) portion of the contracts were clear violations of the Japanese Foreign Exchange Laws."

It is submitted the contract and the Exhibits above referred clearly contemplated a free flow of funds abroad from an exchange non-resident (Colliers in New York) to an exchange resident (Gates), all in absolute disregard of said Articles 27(2), 29 and 30(2)(3) above quoted of the Japanese Foreign Exchange Laws. A careful reading of the said Japanese Law as well as Article XIX above quoted of the Treaty shows that the law has to do as much with the inflow of funds as well as outflow of funds from Japan. This court in its opinion only concerned itself with the outflow portion and did not concern itself with the control of inflow of funds into Japan by controlling the receipt of funds abroad by exchange residents. It is understandable that a country like Japan would impose such restrictions or directions upon its exchange residents to obtain the maximum inflow of funds into Japan. Colliers and Gates violently and openly violated said Articles 27(2), 29 and 30(2)(3) having to do with inflow to the writer of this brief who has much to do with the Japanese Foreign Exchange Law in his daily practice, it is unimaginable how

Colliers and Gates, seeking the privilege to do business in Japan can arbitrarily disregard the restrictions in said Articles 27(2), 29 and 30(2) and (3).

Therefore it is submitted that for the above reasons this court reconsider its decision regarding the legality of the 96B portion (Military Personnel Sales) of the contract under the Japanese Foreign Exchange Law.

B. The Japanese Civilian (97B) Portion of Contract Was Also Illegal under the Japanese Foreign Exchange Laws.

With relation to the Japanese Civilian portion of the Contract (97B) on page 19 of the opening brief it was stated as follows:

> ". . . Defendant's counsel admitted that Colliers paid Gates within the United States in or about the latter half of 1961 the sum of $18,834.24 (U.S. Dollars) on account of the 12½% commission due (Tr. 385-387). See also Plaintiff's Exhibit 93 in Evidence confirming the above illegal payments. Plaintiff's Exhibit 75 shows 7% bonus payments of $262.05 and $23,357.49. All of these were clear violations of Article 27 above recited."

Here again Articles 27(2), 29 and 30(2)(3) aforementioned were violated. Gates (an exchange resident) cannot receive in New York such sums from Colliers in New York (an exchange non-resident).

The Court makes much of the lack of proof of cost but the important thing was the following. Under the contract the following was the split:

Gates rights (59.5%)	
34%	$84.83
7%	17.47
5%	12.50

	12.5%	33.69	
	1%	2.70	$151.19
	Colliers rights (40.5%)		
	40.5%	118.31	118.31
Total	100%	Total	$269.50

These figures are admitted figures because the contract percentages are used and the stipulated sales price of $269.50 is used. Based on the above figures and percentages the only mathematical explanation of the manner in which every $172.00 sent from Tokyo to New York was as follows:

Colliers Rights		
40.5%	$118.00	$118.00
Gates Rights		
12.5%	34.00	
7%	17.00	
1%	3.00	54.00
	Total	$172.00

The foregoing is true by Defendant's own admission. As stated on page 19 of the Opening Brief

> ". . . Defendant's counsel admitted that Colliers paid Gates within the United States in or about the latter half of 1961 the sum of $18,834.24 (U.S. Dollars) on account of the 12½% commission due (Tr. 385-387). See also Plaintiff's Exhibit 93 in Evidence confirming the above illegal payments. Plaintiff's Exhibit 75 shows 7% bonus payments of $262.05 and $23,357.49. All of these were clear violations of Article 27 above recited."

Therefore here again there was a violation of said Articles 27(2), 29 and 30(2)(3). Plaintiff-appellant could not receive such sums in New York without violating the said

Articles. The trial court and this Appellate Court as above stated were only concerned with the outgo of funds from Japan. The Court completely missed the point that these foreign exchange laws control the inflow of funds as well. Exchange Residents in Japan must receive a permit or license to receive funds abroad. This was not done and it is submitted that this Court erred in not giving any consideration to this very important point.

C. The Contracts Were Service Contracts Which Required Prior Approval.

On pages 24 and 25 of the Opening Brief it was argued as follows:

> "Under Articles 42, 43 and 44 of the Japanese Foreign Exchange Laws, the contracts of April, 1960 and September, 1961, were required to be approved by the Minister of Finance. Sections 42, 43 and 44 of Plaintiff's Exhibit 98 in Evidence are quoted in the footnote below.[5]
>
> No such approvals were obtained in the present case (Tr. 987). It is easy to defeat the purpose of these exchange laws by contracting for services and scheming to be paid therefor by illegal transactions above outlined in paragraphs A and B. The very pur-

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5. Articles 42, 43 and 44 read as follows:

"Article 42. Unless authorized as provided for by Cabinet Order, no person shall contract for services *involving payment, settlement or any other transaction governed by the provisions of this law.*"

"Article 43. Unless authorized as provided for by Cabinet Order, no exchange resident shall render services to an exchange non-resident unless an adequate payment is provided in accordance with the provisions of this Law."

"Article 44. Any person or exchange non-resident as specified in the preceding two Articles may be required to obtain prior approval from or present certification of adequate payment to the competent Minister as provided for by Cabinet Order.'

pose of Articles 42, 43 and 44 was to prevent what Colliers engineered in this case.

It is submitted that here again the Japanese Foreign Exchange Law was violated."

The contracts in this case were obviously service contracts. And the service involved "*payment, settlement or any other transaction governed by the provisions of the Foreign Exchange Law.*" As above stated both the military (96B) and Japanese Civilians (97B) portions involved receipt of funds by Gates in the United States. These payments clearly involved Articles 27(2), 29 and 30(2)(3)—they were governed by said Articles but Collier and Gates disregarded said Articles.

Since no approvals were obtained (Tr. 937) the contract is invalid.

This simple point but fatal was presented in the trial court and again in this Court but both courts have chosen to side-step this issue. We ask that this court rule on this simple point upon rehearing.

D. Illegal to Send Book Orders from Tokyo to New York.

At page 25 of the Opening Brief Plaintiff-appellant stated as follows:

"The next violation was the sending out of Tokyo to New York the Yen or U.S. Dollar book orders so that Collier may borrow on said orders from its New York banks. Under Article 45 of said Foreign Currency Control Law which reads as follows:

"Article 45. Unless authorized as provided for by Cabinet Order, no person may export or import means of payment precious metals, securities, or documents embodying rights to claimable assets."

these yen book orders exported were clearly "documents embodying rights to claimable assets." There

> is ample evidence in this case that these book orders were sent out. In fact, Colliers requested in writing that the original be sent to New York. (Tr. 985) (Plaintiff's Exhibit 126 in Evidence)"

Both under the Japanese Civilian (97B) and Military (96B) these book orders were shipped out without proper licenses. Article XIX of the Treaty between Japan and the United States heretofore quoted is not a defense under the 96B shipments because the shipper is Colliers who is not a member of the military forces. Neither is such document a dollar instrument.

This point was raised in the trial court and again before this court. Shouldn't it be answered in a rehearing?

II

Rehearing Based on Other Grounds

A. Court Erred in Granting Attorney's Fees.

In a most recent case of the Supreme Court of the United States, *Fleischman's Distilling Corp.* v. *Maier Brewing Co.*, ... U.S. ....., 87 S. Ct. 1404 (Decided May 8th, 1967), held, at page 1407 with relation to the granting of attorney's fees as follows:

> "The rule here (United States) has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.— In support of the American rule, it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponent's counsel."

The court below erroneously allowed $25,000.00 for attorney fees and $11,011.99 for travel expenses. Upon

a rehearing based on the Fleischman's holding above, the attorney fees and travel expenses should be deleted.

B. Even If the Center of Gravity Rule Applies, Hausman v. Buckley Applies.

It is submitted that even if the center of gravity rule is applied, this court did not answer nor decide the following argument made by plaintiff-appellant at pages 14 to 16 of the Reply Brief.

It was there argued as follows:

> Appellee Collier attempts to argue that the "center of gravity" or "grouping of contracts" rule should govern this case (Ans. Br. 23). But in the very jurisdiction (N.Y.) Appellant Collier says the laws whereof should apply, the "center of gravity" or "grouping of contracts" rule is subject to a recognized exception that when the parties contract with the law (Statutory) of some particular jurisdiction in view, the law of that jurisdiction will be applicable in determining the interpretation and validity of the contract, as the law which the parties presumably intended to be controlling. *Hausman* v. *Buckley,* (C.C.A. 2) (1962) 299 F.2d 696, 93 A.L.R. 2d 1340. In the said case, a derivative action by a minority shareholder of a Venezuelan Corporation was dismissed for the following reasons:

> ". . . Thus defined, we think it is clear that Appellants' position cannot prevail. A rule which provides that the enforcement of corporation claims through derivative actions must be undertaken pursuant to the will of a majority of its stockholders reflects a deliberate policy that such actions ought to be brought not only when the claims may have merit but when the stockholders, as a body, are of the opinion that the corporate welfare is best promoted by suing upon them. The

issue is not just 'who' may maintain an action or 'how' it will be brought, but 'if' it will be brought." . . .

" 'But *a statute of the place where the right arose may impose upon it a condition which goes to its substance,* and, when this is so, the condition will be observed elsewhere. This has ordinarily come up in the case of statutory rights in which the limitation was imposed by the same statute which created the right itself. . . . But it is not necessary that the limitation should be in the same statute, so the purpose be plain to make it a condition.' Wood & Selick, Inc. v. Compagnie Generale Transatlantique, 43 F.2d 941, 942-943 (C.C.A. 2, 1930) (L. Hand, J.)." (Emphasis ours)

See also:

Pinney v. *Nelson,* 183 U.S. 144, 22 S. Ct. 52.

Levy v. *Daniels U-Drive Auto Renting Co.,* (1928) 108 Conn. 333, 143 Atl. 163.

Bradford Electric Light Co., v. *Clapper,* (1932) 286 U.S. 145, 52 S. Ct. 571 (Rt. by way of defense).

Broderick v. *Rosner,* 294 U.S. 629, 55 S. Ct. 589.

Broderick v. *McGuire,* (1934) 119 Conn. 83, 174 Atl. 314.

In the present case the contract contemplated sales in Japanese Yen and it contemplated conversion of said yen into U. S. Dollars. As admitted by the parties, an Import License was absolutely necessary and the Japanese Foreign Exchange Control Act was interwoven in the contract. Charges of fraud by Colliers necessarily involved defenses by Gates involving the said Exchange Act. See arguments VI (B) (C), pages 49-61, Op. Br. Both of the Japan Sales Contracts between Gates and Colliers would have been useless if Colliers couldn't get U. S. Dollars out of Japan. The Japanese Foreign Exchange Act was the backbone of the Tokyo contract and it was as much a part of

the contract as the law of Venezuela was with relation to shareholder's rights of Venezuelan corporations in *Hausman* v. *Buckley* abovementioned. Where foreign statutes are involved the courts will enforce the foreign statutes together with the law of that country (Japanese law in the present case).

The foregoing exception stated in *Hausman* v. *Buckley* applies to tort cases as well. See: *Bradford Electric Light Co.* v. *Clapper, supra; Pearson* v. *Northeast Airlines,* (C.C.A. 2) (1962) 309 F.2d 553, 92 A.L.R. 2d 1162.

This Court did not even attempt to answer this well known exception.

And if the Japan Law applies, shouldn't the case be mandated to the Court below so that the Japanese law may be properly proven and applied? At page 5 of the opinion much is said regarding a "mandatory" but nothing prohibits a debtor-creditor relationship between a mandator and a mandatory. It is undenied that there was a debtor and creditor relationship between Gates and Colliers (Op. Br. 54-55). A mandate relationship mixed with a debtor and creditor relationship is not one which any court may settle in a footnote. Such issues should be only settled by a remand to the court below.

C. Tokyo District Court Pro-Tem Decree Matter Not Decided.

Appellant on pages 39-42 of Opening Brief contended that certain books were sold under a court order—the questions of law raised in said argument are not answered at all.

D. Colliers Rescinded Its Contract of September 1961 and Cannot Sue for Future Liabilities to Arise under Said Contract After Rescinding Contract.

Appellant on pages 60-62 of his Opening Brief submitted an argument to show that when one terminates a contract, said contract is annihilated and future liabilities after date of annihilation, under said annihilated contract cannot be recovered. The legal questions presented in said argument haven't been solved by this court.

Wherefore, upon the foregoing grounds, and for other reasons, appearing in Appellant's Briefs, it is respectfully submitted that a rehearing be granted in the matter, and that the mandate of this Court be stayed pending the disposition of this petition.

Counsel represents and certifies: In counsel's judgment this Petition is well founded and is not interposed for delay.

Respectfully,

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July, 1967